Testimony
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Legislative Hearing, "Authorizing the President's Vision: Making Permanent The Faith-Based and Community Initiative"
Subcommittee on Criminal Justice, Drug Policy, and Human Resources
U.S. House of Representatives' Committee on Government Reform
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Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to comment on President George W. Bush's Faith-Based and Community Initiative, in the context of HR 1054, the Tools for Community Initiatives Act.

I was a member of the original staff of the White House Office of Faith-Based and Community Initiatives, serving from February, 2001, to May, 2002. While there, I worked on policy and legal matters and facilitated the organization and early work of the original five Centers for Faith-Based and Community Initiatives at Health and Human Services; Housing and Urban Development; Justice; Education; and Labor. Before my White House service, and after it, I have been on the staff of the Center for Public Justice, a Christian public-policy, leadership-development, and citizenship-education organization that works on a nonpartisan and ecumenical basis. At the Center I have directed a number of projects on the faith-based initiative, including a project on Tracking the Implementation and Impact of Charitable Choice. The Center has been, and is, a subcontractor on several projects funded by the federal government, providing research and technical assistance products for the HHS Center for Faith-Based and Community Initiatives, and training and technical assistance to state commissions and other partners of the Corporation for National and Community Service. I have also provided research and technical assistance on faith-based policy issues on contract to several states.

I am glad to support the goals of HR 1054, the Tools for Community Initiatives Act: codifying the institutional structure and equal treatment principles of the faith-based initiative. I will suggest below some changes to the bill.

The Faith-Based and Community Initiative

I regard what has come to be called the faith-based and community initiative, or, in common shorthand, the faith-based initiative, to be highly important for the federal government and in revitalizing our society's efforts to serve the needy and to strengthen families and communities.

Its importance is not to be measured by how much change there has been in the delivery of social services to families, individuals, and neighborhoods. There have been very significant policy advances, which I will discuss below. But it is too early, in my view, to expect major changes in the array of the government's partners or in the delivery of services. We should expect that kind of change to be slow, given the institutional complexities of our social service system, vested

interests, bureaucratic inertia, the length of grant and contract cycles, active and passive resistance to change by some officials inside government and some well-funded groups outside of government, a number of continuing legal uncertainties, and the skepticism of some faith-based and grassroots organizations—not to mention the considerable time it takes for nonprofit organizations that previously had no reason to consider collaborating with government to decide to explore the new possibilities, learn the complicated grants and contracts processes, strengthen their internal management and financial capabilities so that they can administer government funds, and expand their capacity so that they can provide services on the scale required by government.

The promise of the faith-based initiative is only beginning to be realized. It is, nonetheless, highly significant. It is, we might say, a catalyst or lever, decisively bending the direction of the federal government's social-service efforts.

What is the new direction? Shortly after taking office in January, 2001, President Bush said, "The indispensable and transforming work of faith-based and other charitable service groups must be encouraged. Government cannot be replaced by charities, but it can and should welcome them as partners. We must heed the growing consensus across America that successful government social programs work in fruitful partnership with community-serving and faith-based organizations—whether run by Methodists, Muslims, Mormons, or good people of no faith at all." And he outlined an "agenda to enlist, equip, enable, empower and expand the heroic works of faith-based and community groups across America."[1]

The President has, accordingly, used his bully pulpit to call attention to the vital work of "neighborhood healers"; called upon Congress to change the tax code in order to stimulate greater private giving to charitable organizations; and directed federal agencies to reach out more effectively, and provide more accessible information, to smaller organizations. And, most notably, he has with determination taken on the difficult challenge of reforming the government's policies and practices of financial collaboration with faith-based organizations—a difficult challenge because federal funds are involved and constitutional guidelines and disputes are at stake.

Government collaboration with religious organizations indeed is not new, as the critics say. But their claim that the partnership functioned well and needed no reform, I submit, is not correct. Official practices, regulations, or statutes sometimes did (and sometimes still do) exclude from participation in federally funded programs some faith-based organizations because they are deemed "too religious" to be a suitable partner. In other instances, religiously inspired organizations could take part but only on condition that they set aside or suppress important religious characteristics and practices.

Thus, for example, it currently remains the case that faith-based service providers that insist on the management practice—protected under Title VII of the 1964 Civil Rights Act—of taking account of religion in employment decisions[2] are ineligible to provide job training services funded by the Workforce Investment Act (WIA) and cannot take part in certain other programs, such as Youthbuild, a HUD program, because these programs require a partnership with WIA's One Stop Centers and mandatory partners must comply with WIA's employment restrictions.

Until a regulatory change made by the current administration, faith-based organizations deemed by HUD lawyers to be "primarily religious" were entirely excluded from helping to provide decent and affordable housing to low income individuals and families through the HOME program, barred from participating even to provide entirely secular activities.[3] A California church operating an effective program for at-risk youth was asked by the city to expand the program using CBDG funds, but the pastor refused because he could not certify, as the paperwork required, that "all religious influences" would be kept out of the program. Officials have sometimes demanded, as the price of receiving government funds, that religious organizations must eliminate religious terms from their names, make their governing boards be secular, or strip "God talk" out of their mission statements.[4]

While many religious organizations have nevertheless been able to join with the government in service to neighbors and community, these collaborations, as legal scholar Stephen Monsma has emphasized, have been subject to challenge because the legal basis for the partnerships was not solid. The resulting uncertainty—as he put it, the risk of being hit by lightening—itself dampened collaboration.[5] One constitutional scholar, reflecting on the restrictive conditions that often accompany federal funds, went so far as to call federal grant programs "relentless engines of secularization."[6]

The 2001 White House report, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, documented a series of impediments that have hampered faith-based groups seeking federal support. Many of the fifteen obstacles created difficulties indiscriminately for secular as well as religious applicants (e.g., the burden of paperwork or the requirement of IRS 501(c)(3) status when a statute specifies only that applicants must be nonprofit organizations), but the religious applicants confronted additional challenges, as well. The chief problem, the report noted, was "an overriding perception by Federal officials that close collaboration with religious organizations is legally suspect."[7] Such worries led to regulations, funding decisions, and grant conditions that placed faith-based applicants at a disadvantage.

In the meantime, the courts have been shifting direction. The previously dominant interpretation of the First Amendment was the strict-separationist doctrine that required of the government "no aid to religion" and an effort to identify which faith-based groups are so "pervasively sectarian" as to be disqualified from government support. In a series of decisions over several decades culminating in *Mitchell* v. *Helms* (2002), the US Supreme Court has shifted to the concept of "neutrality" or "equal treatment." According to this concept, government officials must not disfavor (or favor) an applicant merely because of its religious character. The key question is whether the applicant can provide the services while respecting applicable laws, not how religious or secular the organization might be.[8]

Congress responded to the legal changes and the growing consensus for expanded partnerships by adopting, on four separate occasions, Charitable Choice language that validates the inclusion of faith-based organizations in particular federally funded programs while protecting their religious character, safeguarding the religious liberty of beneficiaries, and honoring constitutional church-state guidelines.[9]

President Bill Clinton signed these bills into law. His HUD secretary opened a Center for Community and Interfaith Partnerships. In the 2000 presidential election campaign, Vice President Al Gore, the Democratic candidate, advocated the expansion of Charitable Choice to new federal programs.[10] Nonetheless, on balance it is fair to say that the Clinton administration was reluctant decisively to push ahead in the new direction of leveling the playing field for explicitly religious social-service organizations.

By contrast, President George W. Bush has made reform of federal programs and operations to ensure equal opportunity to faith-based organizations one of his key initiatives, including such action from the start in his management reform plans.[11] And although legislation favored by the administration to expand Charitable Choice and to revise the tax code to stimulate greater individual and corporate giving has not received congressional approval, the administration has taken many other initiatives, including creation of a Compassion Capital Fund to provide technical assistance and small capacity-building grants to smaller and novice organizations, departmental and White House outreach conferences, redesign of websites so that inexperienced groups can more easily locate information and help, and various pilot projects showing how, for example, local workforce boards can better partner with faith-based and community-based groups.

But most significant, I believe, have been three other initiatives, systemic changes that together are remaking the federal social-services structure and effort to be hospitable to faith-based organizations that desire to collaborate with the government.

The creation of the White House Office of Faith-Based and Community Initiatives, and the counterpart Centers and Taskforces for Faith-based and Community Initiatives in ten federal agencies and the Corporation for National and Community Service, is among the most important initiatives in the Bush reform effort. These offices and their officials lead the process of identifying and removing legal and bureaucratic obstacles to expanded partnerships, organize training conferences and outreach efforts, and work with state and local officials to increase opportunities for faith-based and community-based programs. This institutional structure makes possible persistent attention to the principles, goals, and concerns of the faith-based initiative when policy is being developed, evaluated, and implemented—not only at the high level of the White House but in the actual workings of the administrative departments and agencies.[12]

A second key initiative was the promulgation of Charitable Choice regulations in 2003. The Clinton administration did little to inform state and local officials—the officials who actually administer almost all of the federal funds to which the new rules apply—about the provisions. Those officials now have federal regulations the clarify the requirements and the extent of their application.

Even more important, given that Charitable Choice governs only a few federal programs, is the President's December, 2002, executive order on the "Equal Protection of the Laws for Faith-Based and Community Organizations (Executive Order 13279). This presidential directive mandates equal opportunity for faith-based applicants, safeguards their religious character, establishes guidelines to prevent the diversion of government money from social services to "inherently religious activities" like prayer and evangelism, and protects the religious liberty of

beneficiaries. These equal treatment principles have now been encoded into the general administrative rules of various federal departments to govern all the federal funds that support social services, whether those funds are awarded by federal, state, or local officials (except for those funds governed by Charitable Choice).

Some have criticized the 2002 executive order as an improper sidestepping of congressional opposition to extending the reach of Charitable Choice to additional federal programs. This is incorrect. From the start the Bush initiative contemplated executive action as well as the value of new legislation.[13] I suggest that the Equal Protection Executive Order can better be understood as the administration's response to the development in legal doctrine, which now requires neutrality or equal treatment. More generally, I agree with the conclusion of constitutional scholars Ira Lupu and Robert Tuttle of the Roundtable on Religion and Social Welfare Policy: "The architects of the Faith-Based and Community Initiative deserve a tremendous amount of credit for collapsing the normal time lag between legal change and bureaucratic change. . . . [T]he federal officers running the Initiative have essentially forced the kind of consciousness-raising on bureaucratic and social service culture about the exclusion of faith organizations."[14]

Thus, if there have been few legislative triumphs so far and if the policy reforms that have been made are only beginning to transform governmental practice, nonetheless, in my view, a highly significant reorientation has been imparted to the governmental social-service effort. I agree with a recent assessment of the Bush faith-based initiative which judged that the President's vision of expanded opportunity for faith-based services "has been pervasively and methodically implemented in the workings of the federal government."[15]

Continuing the Reform Effort

I commend Jim Towey, director of the Office of Faith-Based and Community Initiatives, and the directors and staffs of the departmental centers and taskforces, for their persistence and determination in pressing forward the equal treatment reforms. Yet much remains to be done. Let me note seven areas for continued action.

1. Promote State and Local Compliance. Despite the Charitable Choice and equal treatment regulations, it appears that state and local officials often are not familiar with the new standards and often have not taken specific action to ensure that their contracting and grantmaking practices conform to those standards. The Center for Public Justice in 2000 documented poor state compliance with the 1996 Charitable Choice provision for welfare services, and more recent studies, including research by the GAO and the Roundtable on Religion and Social Welfare Policy, indicates continued lagging in knowledge and implementation.[16] Even some of the most reform-minded state officials I have spoken with over the past few months have been unaware that the administration has issued equal treatment regulations covering all federal social-service funds beyond those covered by Charitable Choice. Last summer, the community development and housing agency in a state that is widely regarded as a leader in the faith-based arena posted for public comment on its website revised regulations for the HOME program—reproducing in the proposed new regulations the ban on participation by "primarily religious organizations" that HUD a few months before had removed from the program regulations.

Federal departments, despite all their resources and myriad contacts, apparently have given insufficient guidance to their state and local counterparts about the new requirements and how to meet them. Because some 80-90% of federal social spending goes first to state and local agencies before being awarded to nongovernmental organizations, the new federal rules will have little practical effect on grants and contracts unless state and local policy and practice are conformed to the federal standards. The President has rightly said that improvements in this area are a priority for him. The current disjunction between the promulgation of federal equal treatment standards and the incomplete state and local conformity to those standards when expending federal funds surely is a major reason why many faith-based and community organizations say they have not seen changed practices and are inclined to think that the initiative is largely merely talk.

2. Access to Recovery. Access to Recovery (ATR) is an innovative program created by the Bush administration to provide additional, and different forms of, substance-abuse treatment and recovery-support services, using vouchers to pay for the services, and it is explicitly intended to incorporate faith-based providers that have not been part of the conventional federally funded treatment and prevention networks. To win an ATR grant, states had to promise to offer recovery-support services as well as their usual clinical-treatment programs, to recruit new providers, including faith-based programs, and to institute a voucher system to give addicts a choice of provider and to enable the providers they select to offer services incorporating religion, without violating the Constitution. But federal officials have not issued detailed and comprehensive guidelines for states about what constitutes equal opportunity for previously excluded faith-based treatment providers nor about the freedom they must give those providers to express religion in their programs. Without sufficient well-publicized and clear standards on church/state issues, it appears that, with some notable exceptions, states are not going very far to ensure the robust inclusion of faith-based and other nontraditional services and that at least in some states faith-based organizations have been hobbled by more stringent religious restrictions than required by the courts or contemplated by the ATR program. In response to specific questions and complaints, federal officials have recently issued some clarifying guidance and stepped in to facilitate discussion between faith-based groups and state officials. But success of ATR will require more extensive guidance and assistance from the federal government both to state officials and to faith-based and other nontraditional providers.

3. Give Sufficient Guidance to Faith-Based Partners. Insufficient guidance about the new standards has had another negative consequence. Federal, state, and local officials enthusiastic about welcoming new social-service partners have awarded grants and contracts to inexperienced faith-based organizations without sufficiently clarifying for them all of the accompanying requirements, such as the restrictions on religious expression when the government funds come directly rather than via vouchers. The standards are set forth in regulations and discussed in federal publications such as the White House document, *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*. Yet the implications of the standards require further elaboration, particularly for faith-based organizations with little experience with federal funds and whose past clientele may have largely been of the same religious faiths as the organizations. The result has been several lawsuits resulting in decisions declaring that officials have permitted illegal practices by their faith-based service partners and

requiring an end to those partnerships. The faith-based organizations appear to have acted in good faith; they did not realize that some elements of their programs, though proper when the funding was private, could not be maintained without significant change once government money was accepted. Even some quite experienced religious organizations have expressed to me uncertainty about the detailed outworking of some of the standards and worries about inadvertently violating them.

4. Secure the Religious Staffing Freedom. Despite fierce opposition to the principle, the President and the Office of Faith-Based and Community Initiatives have aggressively defended the freedom of faith-based organizations to take account of religion in hiring staff, emphasizing that groups that accept funds from most federal programs do not forfeit the freedom, instructing them how to use the Religious Freedom Restoration Act to maintain their freedom where there are federal statutory restrictions, and working with Congress to eliminate such restrictions.[17] However, as noted, almost all federal funds for social services pass through state and local officials before being awarded to private groups. And a significant number of states and many large cities require all grantees and contractors, including faith-based ones, to disregard religion when selecting staff. Under what circumstances must faith-based organizations obey a state or local ban on religious staffing even though the federal program that is the source of the funds does not limit the freedom? So far, regulations and other guidance from the federal government has not been sufficiently clear concerning this vital matter. This has left both faith-based organizations and government officials uncertain and their decisions vulnerable to legal challenge.[18]

5. Expand Vouchers to Expand Religious Freedom. When a faith-based organization's provision of social services is paid for by vouchers rather than a direct government grant or contract, the courts do not require that inherently religious activities be kept separate from the government-funded services. Vouchers thus ease church-state concerns, release faith-based providers from otherwise applicable restrictions on religious activities and expression, and enable beneficiaries to be able to choose from a greater diversity of services. Vouchers or certificates have been widely used since 1990 to provide federally funded child care, enabling the widespread participation of faith-based providers and honoring the desires of low-income parents who prefer child care that reflects religious perspectives and standards. The new Access to Recovery program also uses vouchers in order to expand the participation of faith-based organizations and to diversify the services available to people needing drug-treatment and recovery-support services. Furthermore, federal lower court and appellate court decisions in the Faith Works Milwaukee case[19] have suggested a way that contracting can be implemented such that beneficiaries have a genuine and independent choice of provider, as if actual vouchers were used, so that the usual religious restrictions are not necessary and beneficiaries can be afforded a greater range of choices. The administration favors greater use of indirect government funding. However, except for the creation of the Access to Recovery program, it seems that little has been done to encourage federal, state, or local officials to reconfigure programs to use vouchers or to redesign their contracting procedures to confirm to the genuine choice standard. Greater use of indirect funding seems unlikely to occur without forceful federal leadership.

6. Encourage Feedback. The Office of Faith-Based and Community Initiatives and the centers and taskforces are performing a vital service by responding to complaints and questions from

faith-based and other organizations who believe that they have encountered illegitimate obstacles or improper restrictions in their interactions with federal, state, and local officials. Faith-based organizations, for example, who have suspected that their states, in implementing the Access to Recovery voucher system, have improperly sought to enforce the religious restrictions that are required only when the funding is direct, have been able to obtain federal intervention to clarify the design of the ATR program and the appropriate legal standards.

I suggest that the administration consider further developing this function of the faith-based initiative's institutional structure. One of the best ways for the administration to uncover improper or incomplete conformance with the equal treatment and Charitable Choice standards by officials—federal, state, and local—is to make it as easy as possible for faith-based applicants for funding and faith-based organizations that are receiving government funds to make complaints, to seek clarification, and, if needed, to ask for intervention. This feedback mechanism exists, as noted above, but has not been widely publicized. In consequence, many faith-based organizations simply swallow their concerns rather than making a complaint, and take away the idea that the faith-based initiative is mainly about promises rather than actual changes. Because continuous reform is needed in every complex process, an institutionalized feedback mechanism is important to achieve the aims of the faith-based initiative.

7. Highlight Restrictions. Despite good intentions and the many changes that have been made, the playing field is not completely level for faith-based organizations. Unless Congress acts, programs such as the Workforce Investment Act, Head Start, and the national service programs operated by the Corporation for National and Community Service will continue to restrict the religious staffing freedom, thus excluding the participation of faith-based organizations that regard this freedom as essential. Until the scope of federal preemption of state and local restrictions in federally funded programs is clarified,[20] faith-based organizations that apply to participate in federal programs administered by state or local agencies may encounter unexpected restrictions on what they can do, or indeed, may discover that they are unable to participate at all.

Encountering such restrictions and barriers, which may become apparent only far into the application process or only after very careful study of fine print or of regulations that are merely cited rather than reproduced, is disconcerting, at best, to faith-based organizations that have heard for several years that their participation is now welcome and that obstacles have been cleared away.

To give fair warning, as well as to highlight the need for additional reforms, I suggest that federal funding announcements, program descriptions, and legal documents (such as grant and contract documents) should, upfront, explicitly, and in plain language list all conditions, restrictions, and freedoms that apply specifically to the participation of faith-based organizations.[21] An organization should not need to hire a lawyer in order to discover that, contrary to the promise of Charitable Choice, in this particular state or city it will not be allowed by officials to apply to provide welfare services unless it first agrees to end its religious staffing practices. An organization should not need to hunt far and wide in a federal agency's website to discover that the agency will try to work out an accommodation, if possible, if a faith-based applicant believes that a grant restriction wrongly impinges on its religious freedom.

HR 1054, The Tools for Community Initiatives Act

As I noted above, these are seven areas for continued reform, seven ways to further solidify the equal treatment reform in the federal government's policies and practices and in the practices of its state and local partners. They show the need for continued progress, not for a change in direction. So I welcome HR 1054 and its aim of further embedding the institutions and principles of the faith-based initiative into the functioning of the government. I do wish to suggest some changes to the bill. I am not taking a position here on the wisdom of seeking to achieve this aim at this moment by means of this bill.

White House Office of Faith-Based Initiatives and Department/Agency Liaisons. The bill proposes to give the Office of Faith-Based and Community Initiatives (OFBCI) a statutory basis. However, rather than also provide a statutory basis for the existing Centers and Taskforces for Faith-Based and Community Initiatives in various federal departments and agencies and at the Corporation for National and Community Service, the bill proposes only the creation of "designated department or agency liaisons" (sec. 6). I suggest that the bill should specify, instead, the creation or maintenance of Centers for Faith-Based and Community Initiatives.

The White House OFBCI plays a vital role as the spearhead and coordinator of the faith-based initiative for the administration. However, the policies that need to be implemented, pilot projects that should be designed, the barriers that must be uncovered and eliminated, the regulations that should be reviewed and modified, the grantmaking and contract practices that need to be evaluated and improved, the opportunities for creative new partnerships that should be seized—these all are located in federal departments and agencies, and in the state and local agencies that are partners with those federal departments and agencies. A complaint about a Department of Commerce policy may most easily come to the OFBCI, as the highest-profile institution of the initiative, and resolving the problem may require its leadership, but in the final analysis what will have to change is internal to the Department of Commerce—its policies and practices. Similarly, if a state is continuing to lag in its conformance with the Charitable Choice rules that Congress included in the 1996 welfare reform, intervention by the OFBCI director may have some value, but what is most needed is appropriate, vigorous, and proactive training and technical assistance from HHS's regional and other officials who have regular contact with that state's officials.

What is needed are Centers, not simply liaisons—offices and not lone officials. Centers need to have sufficient staff and authority, under their secretaries or agency heads, to be able to investigate problems, recommend solutions, oversee the implementation of recommended changes, propose and oversee pilot projects, provide training and technical assistance inside the department or agency, and ensure that the department's or agency's training and technical assistance given to state and local officials and to nongovernmental agencies conforms to the equal treatment principles. And Centers need to be able to do these things on behalf of, as part of, and for the sake of the department or agency where each is located. For a Center's work to be most effective, the department or agency needs to own it—to see that the changes help the department or agency better fulfill its service mandates and fulfill its legal and constitutional obligations, and are not simply political directives from the White House.

Equal Treatment Principles. HR 1054 proposes adopting as "the sense of Congress" the equal treatment principles articulated in President Bush's Executive Order 13279 on "Equal Protection of the Laws for Faith-Based and Community Initiatives." I believe that such a declaration would be a useful confirmation of the administration's conviction that court decisions and considerations of effective social-service delivery require that federally funded programs be administered in accordance with equal treatment principles and not the old "no aid to religion" principles. I wish to suggest several changes.

1. As does Executive Order 13279, the bill should explicitly state that the equal treatment principles apply whether the federal funds are expended or administered by federal, state, or local officials.

2. I recommend that paragraph (6) be modified. As written, it forbids an organization receiving any form of federal financial assistance from discriminating against a beneficiary or potential beneficiary not only on the basis of the person's religious convictions but also the person's "refusal to participate in a religious practice." This is an appropriate standard in the case of direct government funding, according to current Supreme Court doctrine, which requires that inherently religious practices be separate from a directly funded service and voluntary for the beneficiary. However, current Supreme Court doctrine permits an indirectly funded organization to incorporate inherently religious practices into the government-supported service—for example, religious stories into voucher-funded child care or prayer into voucher-funded ATR recovery support services. If those practices are part of the service that is being offered by the organization, then it would be counterproductive to permit the beneficiary to refuse "to participate in [an incorporated] religious practice." Moreover, since the funding is indirect—the beneficiary has a choice of provider—the beneficiary is safeguarded from religious coercion by being able to choose between providers and should not be able selectively to opt out of portions of the program that the beneficiary has chosen to enter.

3. Because of the importance of vouchers and other forms of indirect funding, not only for the greater freedom permitted to faith-based providers but also for the greater responsibility accorded to the beneficiary, I suggest that the principles should explicitly authorize federal, state, and local administrators to use vouchers and other indirect funding mechanisms where appropriate.

4. Because of the uncertainty concerning whether, in a federally funded program, a faith-based organization retains its freedom under federal law to staff on a religious basis if a state or local agency requires all participants in programs it administers to foreswear religious staffing, I suggest that a paragraph be added to the principles stating that it is the intention of Congress that in federally funded programs the federal rules concerning religious staffing preempt more-restrictive state or local rules.[22]

Other Congressional Action

Finally, I wish to suggest several additional areas for congressional action—other ways to support the principles and goals of HR 1054 and the faith-based initiative generally.

1. Religious Staffing Freedom. As noted, the statutes for a number of federal programs include language restricting or forbidding religious staffing for organizations participating in the program, notwithstanding the Title VII exemption. I recommend that such restrictive language be removed whenever such laws are brought up for reauthorization or review. In addition, I recommend that the House continue to affirm the religious staffing freedom and the other features of the several Charitable Choice provisions when the laws containing Charitable Choice are before you for reauthorization.

2. Alternative Educational Standards for Certification in SAMHSA Programs. When Congress added Charitable Choice language to federal substance-abuse treatment and prevention programs operated by the Substance Abuse and Mental Health Services Administration (SAMHSA) in 2000, a specific provision was included requiring states to give successful faith-based service providers an alternative to the conventional certification of educational qualification to provide such services.[23] The SAMHSA Charitable Choice regulations reiterate this requirement, and SAMHSA has conveyed it to states in additional ways. Yet, it seems that the requirement is universally being ignored by states. It is time for Congress to consider other measures to encourage states to be more flexible—without lowering standards—in certifying substance-abuse treatment providers.

3. Vouchers. In addition to providing generalized authorization to program officials to implement indirect funding when appropriate, the House may wish to add, where appropriate, specific language authorizing indirect funding as new social-service programs are created and existing programs are reauthorized.

4. Intermediaries. Intermediary organizations are increasingly being proposed and utilized in federal programs in order to deliver culturally appropriate training and technical assistance to faith-based and grassroots organizations and to serve as fiscal agents and program administrators on behalf of networks of grassroots organizations. I recommend that, when creating new social-service programs and reauthorizing existing programs, the House consider the appropriateness of intermediary organizations and supply any needed statutory guidance. Should a management fee be authorized for organizations that act as the fiscal agent for grassroots groups? Should statutory language authorize intermediaries to serve only grassroots organizations of the same philosophy or religion, rather than being required to provide services and make subgranting decisions as if the intermediary was a government agency rather than the hub of a network of culturally similar organizations?

5. Evaluating Effectiveness. Supporters as well as critics of the faith-based initiative have drawn attention to the issue of the comparative effectiveness of faith-based and secular service providers. Much more research is being done on the question of outcomes or effectiveness now than before the Bush administration highlighted faith-based organizations, although few reports have yet been published. As useful as such studies might turn out to be, they will not be of much help to government officials who have to choose between specific faith-based and secular applicants for grants or contracts. Perhaps through hearings or the allocation of funds to underwrite research the House can encourage the development of practical measures with which officials might better assess the likelihood that various applicants will operate successful

programs and with which officials might better monitor the performance of organizations while they are being supported by the government.

6. Private Giving. Individual donors, corporations, and foundations are a more important, and more flexible, source of support for nonprofit organizations, faith-based and secular, than government grants and contracts will ever be. The House and the Senate have both adopted similar measures to encourage greater private giving, but the measures have never made it through conferencing and onto the President's desk. One of the most important things the House can do to promote the faith-based and community initiative is to work with the Senate to adopt a measure to encourage greater private giving.

7. Social-Service Spending. Ineffective or counterproductive government social programs should be ended as soon as possible. Actual compassion is a matter of actual results and not mere large expenditures. At the same time, there remain in our society many places and circumstances with genuine needs that require large-scale or long-term action, action beyond that likely from charitable impulses alone. In such places and circumstances, simply ending ineffective programs is insufficient; better responses need to be devised and generously funded. As faith-based (and secular) organizations out on the front lines always remind me, creating equal opportunity in federally funded programs is important, but if there is insufficient funding, then even the most effective and well-qualified providers will be unable to do what is needed. The faith-based initiative is not all about money, but the armies of compassion cannot succeed if the federal government is unwilling to provide adequate funding.

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Thank you for the opportunity to testify on this important bill and this important initiative.

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[1] The White House, *Rallying the Armies of Compassion* (January, 2001).

[2] See Carl H. Esbeck, Stanley W. Carlson-Thies, and Ronald J. Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (Center for Public Justice, 2004), pp. 25-54. The text is available at <<http://esa-online.org/freedom/pdfs/freedom.pdf>>.

[3] HOME program regulation, 24 CFR 92.257, now superceded by an equal treatment provision.

[4] For the name and governing board examples, see the Dec. 12, 2002 Associated Press story, "Bush Pushes 'Faith-Based' Measure," available at <<http://www.beliefnet.com/story/118/story_11852.html?rnd=98>>, and *Faith-Based Initiatives: Four Catholic Views* (Washington, DC: Faith & Reason Institute, [2002]), p.7. The mission statement example was related to me by the director of a faith-based inner-city homeless shelter in a New England state.

[5] Stephen Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Rowman & Littlefield, 1996). For an early inventory of inappropriate federal, state, and local statutory and regulatory restrictions on faith-based organizations, see Carl H.

Esbeck, *The Regulation of Religious Organizations as Recipients of Governmental Assistance* (Washington, DC: Center for Public Justice, 1996).

[6] Michael W. McConnell, "Equal Treatment and Religious Discrimination," in Stephen V. Monsma and J. Christopher Soper, eds., *Equal Treatment of Religion in a Pluralistic Society* (Wm. B. Eerdmans, 1998).

[7] The White House, Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs (August 2001), p. 10.

[8] See Carl H. Esbeck, Senior Counsel to the Deputy Attorney General, U.S. Department of Justice, *Statement Before the United States House of Representatives Concerning Charitable Choice and the Community Solutions Act,* Subcommittee on the Constitution of the House Judiciary Committee (June 12, 2001), *reprinted at* 16 NOTRE DAME J. OF LAW, ETHICS & PUB. POLICY 567 (2002).

[9] Charitable Choice was adopted in 1996 to cover the newly created TANF program; the same language covered the Welfare-to-Work program adopted in 1997. In 1998 Charitable Choice language was added to the Community Services Block Grant program when it was reauthorized. In 2000, Congress twice adopted Charitable Choice language to govern drug treatment and prevention programs operated by the Substance Abuse and Mental Health Services Administration in HHS. Charitable Choice does not represent the first time Congress deliberately wrote legislation to create a welcoming environment for religious social-service providers. Earlier examples include the Child Care and Development Block Grant Act of 1990, created with a child-care certificate or voucher option to enable participation by religious organizations, and the Adolescent Family Life Act of 1981, which specifically contemplated the involvement of religious organizations in providing abstinence-education services. For background on Charitable Choice, see Stanley W. Carlson-Thies, "Charitable Choice: Bringing Religion Back into American Welfare," in Hugh Heclo and Wilfred M. McClay, eds., *Religion Returns to the Public Square: Faith and Policy in America* (Washington, DC: Woodrow Wilson Center Press; Baltimore: Johns Hopkins Univ. Press, 2003), pp. 269-97; and Ronald J. Sider, "Evaluating the Faith-Based Initiative: Is Charitable Choice Good Public Policy?" The Sorenson Lecture, Yale Divinity School (October 15, 2002).

[10] "Remarks as Prepared for Delivery by Vice President Al Gore On the Role of Faith-Based Organizations," Monday, May 24, 1999. The text can be accessed at <<http://www.cpjustice.org/stories/storyReader$384>>.

[11] Note the inclusion of the "faith-based and community initiative" in *The President's Management Agenda, Fiscal Year 2002* (Office of Management and Budget).

[12] Cf. Kathryn Dunn Tenpas, "Can an Office Change a Country? The White House Office of Faith-Based and Community Initiatives, a Year in Review," (Brookings Institution, July, 2002, updated October, 2002).

[13] See Carl H. Esbeck, "A Retrospective on the Bush Initiative, 2001-04, and On Turning Obstacles into Opportunities, 2005-08," a speech for the conference of the Religious Liberties Practice Group of the Federalist Society, "A Post-Election Look at Charitable Choice and the President's Faith-Based and Community Initiative," Washington DC, Feb. 10, 2005; text available at << www.fed-soc.org/Publications/Transcripts/faithbased.pdf>>.

[14] The Roundtable on Religion and Social Welfare Policy, transcript, "Opening Remarks and Plenary Session, Thursday, December 9, 2004, State of the Law 2004," 2004 Annual Conference, Washington, DC, p. 5.

[15] Anne Farris, Richard Nathan, and David Wright, *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative* (Roundtable on Religion and Social Welfare Policy, August, 2004), Executive Summary.

[16] Center for Public Justice, *Charitable Choice Compliance: A National Report Card*; GAO, *Charitable Choice: Federal Guidance on Statutory Provisions Could Improve Consistency of Implementation* (Sept. 2002), GAO-02-887; Mark Ragan, et al., *Scanning the Policy Environment for Faith-Based Social Services in the United States: Results of a 50-State Study* (Roundtable on Religion and Social Welfare Policy, Oct. 2003).

[17] White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* (2003). For a complete discussion of the issue and the administration's views and actions, see Esbeck, et al., *Freedom of Faith-Based Organizations to Staff on a Religious Basis*.

[18] Esbeck, et al., *Freedom of Faith-Based Organizations to Staff on a Religious Basis*, pp. 65-85.

[19] *Freedom From Religion Foundation* v. *McCallum*, 214 F.Supp. 2d 905 (W.D. Wis. 2002), aff'd 324 F.3d 880 (7th Cir. 2003).

[20] See Esbeck, et al., *Freedom of Faith-Based Organizations to Staff on a Religious Basis*, pp. 65-85.

[21] I am adapting an idea from the Working Group on Human Needs and Faith-Based and Community Initiatives, *Harnessing Civic and Faith-Based Power to Fight Poverty* (Search for Common Ground, April 2003), p. 19.

[22] In creating the Washington DC school-voucher program, Congress included a provision specifically overriding the prohibition of religious staffing in a municipal ordinance. DC School Choice Incentive Act of 2003, adopted as part of the Consolidated Appropriations Act, 2004, H.R.2673, 108th Congress.

[23] 42 USC 290kk-3.